ATTORNEY FOR APPELLANT:

JEREMY K. NIX
Matheny Michael Hahn & Denman, LLP
Huntington, Indiana

ATTORNEY FOR APPELLEE:

LISA M. GARROTT
DeLaney Hartburg & Roth, LLP
Huntington, Indiana

IN THE
COURT OF APPEALS OF INDIANA

SHAWN KARST,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 35A02-0707-CV-580
	)	
THE TOWN OF MOUNT ETNA, INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HUNTINGTON CIRCUIT COURT
The Honorable Thomas M. Hakes, Judge
Cause No. 35C01-0609-PL-571

March 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Shawn Karst appeals the trial court's entry of a permanent injunction and its imposition of a fine for his failure to abate a nuisance. We affirm.

Issues

Karst raises two issues, which we restate as:

I. whether the trial court properly concluded that Karst's dog breeding operation was a nuisance; and

II. whether the trial court properly fined Karst for his failure to abate a nuisance.

Facts

In 1995, Karst moved into a house with his girlfriend. Karst's girlfriend's parents owned the house.[1] While he lived there, Karst began a dog breeding operation on the property. At any given time, Karst had between twenty-five and forty-nine dogs on the one hundred-foot by ninety-nine-foot lot. See Tr. p. 37. On the lot, Karst maintained twenty "chain spots" for the adult dogs. Id. at 39. Each spot had shelter, food, and water for the dog and was spaced so that the dogs did not come into contact with one another. The remaining dogs were puppies that stayed in the house with their mothers. The dogs were bathed monthly, and Karst vaccinated them.

A six-foot high privacy fence surrounded the lot. In the back corner of the lot, Karst stored three to four years of dog waste. The pile was twelve to thirteen feet long

[1] At trial Karst testified that he and his girlfriend were in the process of getting the deed transferred to their names. Because no one argues otherwise, for the purposes of this appeal, we will assume Karst is the owner of the property at issue.

and three to four feet wide. Karst used lime to control the odor, and had recently begun to dispose of the waste in a dumpster.

Neighbors began complaining about the noise, odor, and dust associated with Karst's operation. Although Karst was not cited by animal control or the health department for any violations, in June 2006, the Town of Mt. Etna issued a citation to Karst for a violation of its nuisance ordinance. Karst failed to abate the nuisance and, on September 29, 2006, Mt. Etna filed a complaint seeking injunctive relief and a fine. The trial court did not grant a preliminary injunction, and the parties proceeded on Mt. Etna's amended complaint.

On May 23, 2007, after a trial, the trial court found:

> 1. That Defendant has maintained up to twenty (20) to forty (40) dogs on the property.
>
> 2. That the dogs [sic] barking have interrupted the sleep of neighbors.
>
> 3. That odor from improper disposal of dog waste is offensive to the senses of a reasonable person.
>
> 4. That Defendant is in violation of I.C.32-30-6-1 et seq.
>
> 5. That Defendant is in violation of Town of Mount Etna Ordinance 2005-12.
>
> 6. That Defendant was properly served with notice of the violation on June 7, 2006 and a citation was issued on June 26, 2006.
>
> 7. That Defendant's violation on June 26, 2006 carried a fine of $25.00.
>
> 8. That Defendant's continuing violation for June 27, 2006 carried a fine of $50.00.

9. That Defendant's continuing violation for June 28, 2006 to the present carries a fine of $100.00 per day.

10. That a reasonable number of dogs would be no greater than four (4).

Appellant's App. p. 48. The trial court permanently enjoined Karst from further maintaining a nuisance and fined him $33,075.00. The trial court permitted the fine to be reduced to $175.00 if Karst cleaned up the yard and reduced the number of dogs to a reasonable number within thirty days. Karst did so, and the fine was reduced. Karst now appeals.

Analysis

Here, neither party requested findings and conclusions pursuant to Indiana Trial Rule 52(A) prior to the hearing; therefore, the trial court entered them sua sponte. In such a case, the general judgment will control as to issues upon which the trial court has not expressly found, and the special findings will control the issues that they cover. Clark v. Hunter, 861 N.E.2d 1202, 1206 (Ind. Ct. App. 2007). "Special findings will be reversed on appeal only if they are clearly erroneous." Id. On the other hand, a general judgment will be affirmed upon any legal theory consistent with the evidence. Id.

"To determine whether the findings or judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, and we will not reweigh the evidence or assess witness credibility." Pramco III, LLC v. Yoder, 874 N.E.2d 1006, 1010 (Ind. Ct. App. 2007). A judgment is

clearly erroneous if our examination of the record leaves us with the firm conviction that a mistake has been made. Id.

I. Nuisance

Karst argues that his conduct did not amount to a nuisance. He contends that the evidence does not support the findings. Karst first contends that there is no evidence supporting the trial court's finding that his dogs interrupted the sleep of multiple neighbors.

To the contrary, one neighbor specifically testified that the dogs have kept him from sleeping. That neighbor stated, "We have had to revert to putting a fan in our bedroom and turning the fan on in the nighttime so we do not hear the dogs." Tr. p. 21. Based on this neighbor's reference to "we," it is reasonable to infer the dogs' barking disturbed more than one person's sleep.

Karst next asserts there is no evidence to support the trial court's finding that he improperly disposed of the dog waste. However, one can infer that the collection of three to four years of waste for approximately thirty dogs in the corner of a residential lot into a pile that was twelve to thirteen feet long and three to four feet wide was improper. This is especially true when considering the testimony of the representative from the Huntington County Animal Control office who testified that Karst's use of lime to control the odor could be unhealthy for the animals. Further, Karst testified that the "health board" told him that he is allowed to dispose of the waste into the dumpster or the trash. Tr. p. 39. Karst is now removing the existing waste into a dumpster one bucket at

a time. From this evidence it is reasonable to infer that Karst improperly stored the animal waste on his property.

Karst goes on to argue that there is no evidence that the odor complained of by the neighbors was from dog waste. We disagree. One neighbor testified that he no longer had cookouts or bonfires because of the odor. The same witness stated:

> With the windows down, well now that it's Spring, we're opening the windows and were sitting watching T.V. last night and the odor, course Shawn just cleaned up his property yesterday, and the odor was coming, the wind was blowing from the west and it was blowing right into the house.

Tr. p. 13. Another witness testified that she notices the smell when she walks by the property. See id. at 72. Yet another witness testified that he smells "them from about a block away." Id. at 80. From this evidence, it is reasonable to infer that the odor is associated with the dog waste. To the extent that Karst argues otherwise, he is simply asking us to reweigh the evidence. We decline to do so.

Karst also argues that his dog breeding operation was an annoyance, but did not amount to a nuisance. Although Karst's dogs were well cared for, it does not mean they did not create a nuisance, which is defined as, "Whatever is: (1) injurious to health; (2) indecent; (3) offensive to the senses; or (4) an obstruction to the free use of property; so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action." Ind. Code § 32-30-6-6. A civil action to abate or enjoin a nuisance may be brought by an attorney representing the county in which a nuisance exists or the attorney of any city or town in which a nuisance exists. I.C. § 32-30-6-7(b).

Generally, "It is for the trial court to determine whether the amount of annoyance under all the facts and circumstances did or did not constitute a nuisance within the provisions of the statute." Davoust v. Mitchell, 146 Ind. App. 536, 541, 257 N.E.2d 332, 335 (1970). "In determining what constitutes a nuisance, the relevant inquiry is whether the thing complained of produces such a condition as in the judgment of reasonable persons is naturally productive of actual physical discomfort to persons of ordinary sensibility, tastes, and habits." Wendt v. Kerkhof, 594 N.E.2d 795, 797 (Ind. Ct. App. 1992).

Given the evidence of the dogs' barking, the odor associated with their waste, and the dust created by them, the trial court was within its discretion to determine that Karst's dog breeding operation constituted a nuisance. To hold otherwise would require us to reweigh the evidence. We will not do this. The trial court's judgment regarding the existence of a nuisance is not clearly erroneous.

II. Fine

Karst also contends that he was improperly fined as a result of his failure to abate the nuisance. He argues that Mt. Etna Ordinance 2005-12 should not be applied to him because he moved into the property in 1995 and began his dog breeding operation before the ordinance was enacted in 2005. He suggests that his dog breeding operation is simply a non-conforming use subject to his vested rights to use the property.

In 2005, Mt. Etna enacted an ordinance addressing public nuisances. The Ordinance defines nuisance in part as "offenses which are known to the common law and the statutes of Indiana as public nuisances." App. p. 8. The Ordinance requires that

property owners be given notice of the violation and an opportunity to abate the nuisance. Upon one's failure to abate a nuisance, a citation may be issued. The fine for the first offense is $25.00. The fine for the second offense is $50.00. The fine for all subsequent offenses is $100.00. The Ordinance also provides, "Each subsequent day of violations shall be considered a separate and chargeable offense." Id. at 10.

Summarizing vested rights for purposes of zoning ordinances,[2] our supreme court has stated:

> The first line of cases arises under a zoning law principle called "nonconforming use." A nonconforming use is a use of property that lawfully existed prior to the enactment of a zoning ordinance that continues after the ordinance's effective date even though it does not comply with the ordinance's restrictions. The general rule is that a nonconforming use may not be terminated by a new zoning enactment. In these situations, it is often said that the landowner had a "vested right" in the use of the property before the use became nonconforming, and because the right was vested, the government could not terminate it without implicating the Due Process or Takings Clauses of the Fifth Amendment of the federal constitution, applicable to the states through the Fourteenth Amendment.

Metro. Dev. Comm'n of Marion County v. Pinnacle Media, LLC, 836 N.E.2d 422, 425 (Ind. 2005) (footnote omitted) (citations omitted).

This case, however, does not involve Mt. Etna changing the zoning of Karst's property or his continuation of a "non-conforming use." Instead, this case involves Mt. Etna enacting an ordinance limiting nuisances and imposing fines for the failure to abate

---

[2] The case upon which Karst relies for the proposition that an ordinance is subject to the vested rights of the property owner specifically addressed zoning ordinances, not nuisances. See Town of Avon v. Harville, 718 N.E.2d 1994, 1198-99 (Ind. Ct. App. 1999).

such. Unlike a non-conforming use associated with a zoning change, we cannot conclude that Karst had a vested right in continuing a nuisance simply because it was ongoing prior to the enactment of the Ordinance. Karst's argument fails.[3]

Conclusion

The trial court properly concluded that Karst's dog breeding operation constituted a nuisance and imposed a fine pursuant to the Ordinance. We affirm.

Affirmed.

NAJAM, J., and BAILEY, J., concur.

[3] Because of our holding that the trial court properly imposed the fine, we need not address Karst's argument that the rental value of the property, instead of the fine, is the proper measure of damages.